HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

Criminal Appeal No. 99 of 2002

Mr. Harman Chrust vs. State

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 16.4.2005

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL

Crl. Appeal No. 99 of 2002

Mr. Harman Chrust
S/o Godress Fard r/o How, Germany .....
Appellant

Versus

State ..... Opposite Party

Mr. P.S. Adhikari, Sr. Advocate, assisted by Mr. B.S. Adhikari, Advocate for the appellant.
Mr. A. Rab, Addl. Govt. Advocate & Mr. Nandan Arya, Addl. Government Advocate for
the State.

Coram: Hon'ble Irshad Hussain.J.
Hon'ble Rajesh Tandon, J.

Dated: April 16, 2005

Per Hon'ble Rajesh Tandon, J.

This is an appeal against the judgment and order dated 1.5.2002 passed by the Special Judge, Bageshwar, convicting the accused-appellant under section 20 (B)(ii) read with section 22 of Narcotic Drugs and Psychotropic Substances Act and sentencing him to undergo rigorous imprisonment for 12 years and to pay a fine of rupees two laces and in default of payment of fine to further undergo simple imprisonment for six months.

Briefly stated the facts giving rise to the present appeal are that on the basis of information received by

the police from some informer, police conducted a raid in the house of Govind Singh in village Kapkote, District Bageshwar on 25.102001 at

about 7.30 AM. Mr. D.S. Negi, Deputy Superintendent, headed the police party. Accused Harman Chrust was found present in the house. After making search of the room police recovered 6.800 Kg. Charas, which was kept in a raksin bag hanging on the wall. The Police took as sample of 200 gm. Charas for chemical analysis and remaining Charas was sealed in the bag. On personal search of the accused a sum of Rs.14,800/- and a passport was recovered. The Police tried to procure public witnesses but the public persons denied to be witness of the recovery. The police prepared recovery memo Ex.ka-1 and information regarding the arrest of the accused was sent to the embassy of Germany. The accused along with the recovered material was brought to Police Station, Bageshwar, where F.I.R. Ex.ka-7 was lodged and a case was registered in the G.D. at serial no. 15 on 25.10.2001 at 11.45 AM. The recovered Charas was sent to Malkhana through letter Ex.ka-4 As the case was related to the Revenue Police Circle, therefore, the case was transferred to Tehsildar Kapkote who handed over the investigation of the case to Naib Tehsildar, Kapkote through letter Ex. Ka-10. The Investigating Officer visited the place of occurrence and prepared site plan Ex.ka-5. He took statement of witnesses and after

completing investigation submitted charge sheet Ex.ka-6 against the accused.

The accused was charged for the offence punishable under section 20 (b) read with section 22 of the Narcotic Drugs and Phychotropic Substances Act, he pleaded not guilty and claimed to be tried.

To prove its case, the prosecution examined P.W.1 Head Constable Jagdish Prasad, P.W.2 Devendra Singh Negi, Dy. S.P. P.W.3 Uday Singh Rana, Tehsildar, P.W.4 Gopi Chandra Arya,

Kanoongo, P.W.5 Mohmmed Ali, Head Moharir and P.W.6 Khushal Ram, Patwari.

The accused in his statement under section 313 Cr.P.C. denied the prosecution allegations and stated as under:

"I was sitting in a tea stall near Kapkot, some local persons were also sitting there in the tea stall and they were having some bags. In the mean time some police persons came there. The local persons who were sitting there ran away from the back side of the tea stall. The bas were left away by these local persons in the tea stall. Police persons asked me about the bags. I replied that I have no knowledge about the bags and do not know about the ownership of the bags. The police persons looked into the bags. As all the persons along with the owner of the tea stall had run away the police took me with them to police station for inquiry. The police snatched away my money, passport, visa at Police Station. They implicated me

falsely. I was never the tenant of Govind Singh and I was not arrested from the room of Govind Singh. I am an Automobile Engineer and came to India as a tourist. I do not know what a thing called charas. I never used it. I am idea and bonafide citizen of my country."

No evidence in defence has been adduced.

The learned Special Judge after considering the evidence on record held the accused guilty of the offence punishable under section 20(B) (ii) read with section 22 of the N.D.P.S. Act and convicted and sentenced him as stated above. Feeling aggrieved the present appeal has been filed.

We have heard the learned counsel for the appellant as well as learned Additional Government Advocate for the State.

The submissions of the learned counsel for the appellant is that there is no public witness of the recovery. The recovery was alleged to have been made from a room of the house of one Sri Govind Singh but even Sri Govind Singh was not interrogated not he was asked to witness the recovery. It has not been made clear by the prosecution that whether that house was being used as guesthouse or hotel and if the accused was living in that room there should have been articles of daily use i.e. cot, beddings and utensils but according to the prosecution witnesses there was only a mat on the floor and a bag having Charas in it, was hanging on the wall. The area from

where the alleg3ed recovery was made comes within the jurisdiction of Revenue Police but no permission has been taken by the regular police to conduct the raid. The F.I.R. of the case was not lodged at Kapkote before any Revenue Police Officer or at the Patwari Chawki but the accused was brought to Police Station, Bageshwar, report was lodged and recovered articles were also deposited there. The sample was lying in the Malkhana and no link evidence has been adduced by the prosecution that the recovered substance was not tempered with and was remained intact. In nutshell the counsel has submitted that the conviction of the appellant by the learned Special Judge was one the basis of conjecture and surmises.

On the other hand the Additional government Advocate has submitted that the conviction of the appellant was justified as more than six kilograms of Charas was recovered and the recovery was made before the magistrate i.e. Tehsildar, Kapkote.

We have given our thoughtful consideration to the submission made by the learned counsel for both the parties on

facts and also on law. As per prosecution case the search was made at about 4.50 or 5.00 AM but the proviso to section 42 (1) of N.D.P.S. Act has nto been complied with. Section 42 (1) and section 42(2) read as under:

“42 Power of entry, search seizure and arrest without warrant or authorsation- (1) Any such officer

(being an Officer superior in rank to a peon, sepoy or constable of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such office (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, policy or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he h as reason to believe from personal knowledge or information given by any person taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this act has been committed or any document or other article which may furnish evidence of the commkission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset-

(a) Enter into and search any such building, conveyance or place;

(b) In case of resistance, break open any door and remove any obstacle to such entry;

(c) Seize such drug or substance and all materials used in the manufacture thereof and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) Detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorization cannot be abstained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building conveyance or enclosed place at any time between sun set and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub section (1) or records grounds for his belief under the proviso thereto, he shall within seventy two hours sent a copy thereof to his immediate official superior.

In view of the proviso to Section 42 (1) where an office has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender,

He may enter and search such building after recording the ground of his belief. Although the Police team proceeded for conducting raid on the alleged information received by them from informer but Sri Devendra Singh Negi, Dy. S.P. has not recorded such information in writing.

We have perused the evidence led in this regard by the prosecution. P.W. 2 Devendra Singh Negi, Dy. S.P. who received the information and was leading the Police party for conducting raid stated in his statement that he has not taken search warrant from competent authority. Reason for the same was also not scribed in writing.

P.W.1 Jagdish Parsad who at the relevant time was posted as Reader to C.O. Police stated in his cross-examination that they have no search warrant. He also stated that no information regarding the matter was noted down in writing for the higher officers.

P.W.3 Sri Udai Singh Rana who was posted as Tehsildar, Kapkote at the relevant time admitted in his cross-examination that no search warrant was taken nor any reason about it has been noted down in writing.

Thus from the above discussion it is amply clear that proviso to section 42(2) has not been complied with. The Apex Court in the case of State of Punjab vs. Balbir Singh (1994) 3 SCC 299 observed as under:

"2-c) *Under Section 42(1) the empowered officer if has a prior information given by any person, that should necessarily be taken down in writing. But if he has reason to believe from personal knowledge that offences under chapter IV have been committed or materials which may furnish evidence of commission of such offences are*

Concealed in any building etc. he may carry out the arrest or search without a warrant between sunrise and sunset and this provision does not mandate that he should record his reasons of belief. But under the proviso to Section 42 (1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief.

To this extant these provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial."

In the case of State of Punjab vs. Baldev Singh (1999) 6 SCC 172, a Constitution Bench of the Hon'ble Supreme Court observed in paragraph 9 and 10 as under:

"Sub-section (1) of Section 42 lays down that the empowered officer, if has prior information given by any person, he should necessarily take it down in writing and where he has reason to believe from his

personal knowledge that offences under Chapter IV have been committed or that materials which may furnish evidence of commission of such offences are concealed in any building etc. he may carry out the arrest or search, without a warrant between sunrise and sunset, and he may do so without recording his reasons of belief.

The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-

section (2) of Section 42, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior. Section 43 deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not

contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful."

The Apex Court by referring to the above decisions in the matter of The State of West Bengal & others vs. Babu Chakerborty, 2004(3) Crimes 378(SC) reiterated as under:

"Great significance has been attached to the mandatory nature of the provisions; keeping in mind the stringent punishment prescribed in the Act. This Court has attached great importance to the recording of the information and the ground of belief since that would be the earliest version that will be available to a Court of law and the accused while defending his prosecution. This Court of also held that failure to comply with Section 42(1) proviso to section 42(1) and section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused."

Thus the prosecution in the instant case has utterly failed to prove the compliance of section 42 of the Act. In a

situation like this, the decision of the Apex Corut in M. Prabhulal vs. Assistant Director, Directorate of Revenue Intelligence; 2003 Supreme Court Cases (Cri) 2024, relied upon by learned AG.A. has no bearing to the facts of this case. The reason is that in the reported case the information regarding the contraband

received was recorded in writing as per Ext. P.W.1 and it was held that since it was received and recorded by Gazetted Officer and search was made by him the provision of sub-section (2) of section 42 of the Act was not attracted in the sense that the recorded information was not to be sent to immediate official superior. However in the instant case the information allegedly received was not recorded in writing and therefore the earlier mentioned decisions of Apex Court squarely apply to the facts of this case.

In the present case no independent public witness has been examined although as per statements of prosecution witnesses village people were collected there. Further there is no evidence to prove that a room was given by Govind Singh to the accused for his stay. There is nothing on record to show that the accused was in exclusive possession of the room. It is not disputed that the Charas was recovered from the house of Govind Singh. The accused is a foreign national and it has been admitted by the prosecution witnesses that information regarding his stay was not given to the local police authority.

Section 7 of the Foreigners Act, 1946 reads as under:

7. It is the obligation of hotel keepers and others to furnish particulars: (1) It shall be the duty of the keeper of any premises whether furnished or unfurnished where lodging or sleeping accommodation is provided for reward, to submit to such person and in

such manner such information in respect of foreigners accommodated in such premises, as may be prescribed.

Explanation- The information referred to in this sub section may relate to all or any of the foreigners accommodated at such premises and may be required to be submitted periodically or at any specific time or occasion.

No personal article belonging to the accused was recovered inside the bag in which the alleged contraband article was kept nor any personal article was recovered from the room to show that the accused was staying there to collect Charas. According to P.W.2 Sri Devendra Singh Negi only a passport and currency notes of Rs. 14,800/- were recovered on the personal search of the accused. It was for the prosecution to prove that accused was in exclusive possession of the bag containing the Charas which was recovered from a room of the house of Govind Singh. P.W.2 Sri Devendra Singh Negi in his cross examination stated that name of the accused was not printed on the bag nor any personal article of the accused was found in side the bag. In reply to the question asked by the trial Court, he stated as under:

;g cSx ns[kdj ugh dgk tk ldrk gS fd ;g oSx gjeu dzLV dk gS A?kVukLFky ij bl oSx dks ek= ns[kdj ugh dgk tk ldrk Fkk fd fd gjeu dzLV dk gh gksA

The contraband article seized appears to have not been kept in proper custody and proper form. The

Investigating Officer P.W.4 Gopi Chandra Arya has stated that he went to P.S. Bageshwar on 3.11.2001 and took the recovered article in his possession. He stated that there were two items. One was 200 gm. of sample of recovered charas and another was sealed bag.

He stated that the deposited the recovered article i.e. 6.600 kg. Charas in a bag, in the Malkhana on that day. He kept the other packet of sample with him. The form of submission of said sealed bag in Sadar Malkhana according to the statement Ext. ka.4, is dated 7.11.2001, which means that the bag was not delivered at Malkhana the same day i.e. 3.11.2001 but was delivered on 7.11.2001. The recovery of contraband article was made on 25.102001 but there is no link evidence that the recovered article was kept in the safe custody during that period i.e. from 25.10.2001 to 3.11.2001. P.W.6, Patwari Khushal Ram did not state that on 27.11.2001 the seal affixed on the sample of recovered article was tallied with the sample seal when it was opened in the Court for sending it in a sealed container to the Chemical Examiner. Further there is no evidence that sample seal of Dy. S.P. was deposited in the Malkhana. P.W.4 Gopichand Arya, Investigating Officer also stated in his cross examination that he could not say as to how many days the case property was lying in the police Station. According to him he kept the case property in his

house, till it was handed over to P.W.6, on 27.11.2001. He stated as under:

eky eqdnekrh eSusa vius ikl vius ?kj esa j[kk Fkk ckn esa iVokjh ifr;klkj dks lkSai fn;kA

The Hon'ble Supreme Court in the case Baldev Singh vs. state of Punjab 2005(1) Crime 451 observed as under:

"In Ramesh vs. State of Haryana, this Court held that the report of the Chemical Examiner cannot be read into evidence in the absence of link evidence as no question was put to the accused when examined under section 313 Cr.P.C. that the sample was not tampered with while it was in custody of police.

In Sawant Ram v. State of Haryana and Kapil Dev v. State of Punjab this Court has considered the link evidence having not been put to the appellant under section 313 Cr. P.C. as a basis infirmity. In the aforesaid two cases, the other judgments on the point, rendered by this Court were also relied upon."

Another point, which creates suspicion about the authenticity of the prosecution story, is that the recovery and seizure has not been made in accordance with the standing instruction No. 1/88 dated 15.3.1988 issued by the Narcotics Control Bureau, New Delhi. Clause 1.9 of the Instructions reads as under:

1.9 It needs no emphasis that all samples must be drawn and sealed in the presence of the accused, Panchnama witnesses and seizing officer and all of them shall be required to put their signatures on each sample. The official seal of the seizing officer should also be affixed. If the person from whose custody the drugs have been recovered, wants to put his own seal on the sample, the same may be allowed on both the original and the; duplicate of each of the samples. The sample in duplicate should be kept in heat sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in paper envelop may be sealed properly. Such sealed envelop may be marked as original and duplicate. Both the envelop should also bear the S.No. of the package (s) container (s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of

the test memo. The seal should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "secret-Drug sample/Test Memo" to be sent to the concerned chemical laboratory.

Thus in the absence of link evidence it could not be said with certainty that material seized was one sent for chemical analysis. Sri Khusal Ram P.W. 6 who took the sample of recovered article for chemical analysis stated in his examination in chief that on

27.11.2001 he along with Supervisor Kanoongo appeared before the Court with case property. The sample was opened there and again it was sealed. He did not state that the seal was tallied with the sample seal.

According to Clause 13 of notification referred above , the samples must be dispatched to the Laboratory within 72 hours but P.W.7 Khusal Ram Patwari stated in his statement on oath that he submitted sample in Laboratory at Agra on 29.11.2001 i.e. after more than one month from the date of seizure of the contraband article.

Much emphasis has been placed by the learned counsel for the appellant on the point that regular Police has no jurisdiction in the area from where the alleged recovery was made. That area comes within the jurisdiction of Revenue Police and under Scheduled Districts Act, 1874; only the Collector is empowered to give permission to the Police to invade that area in case there is any problem of law and order. In the present case no permission of the Collector has been obtained by Sri Devendra Singh Negi, Dy. S.P. to conduct raid in the area within the jurisdiction of Revenue Police. P.W.1 H.C. Jagdish Prasad admitted this fact. He stated in his cross-

examination that if District Magistrate orders, police can enter in the Patwari circle. District Magistrate, Bageshwar and Superintendent of Police did not issue

any such order. He admitted that regular police has no right to take cognizance of any offence within the limits of revenue Police circle.

Further P.W.2 Sri Devendra Singh Negi, Dy. S.P. had admitted in his cross-examination that no permission was obtained by him for conducting raid in the Revenue Police area. This witness has stated that he had not taken any permission either from the District Magistrate or from the S.P. in writing, as it had become night, He had not given any information regarding recovery of Charas to his higher authorities.

Thus Sri Devendra Singh Negi, Dy. S.P. not only failed to comply the mandatory provisions of recovery and seizure of contraband narcotic substances but he exercised the jurisdiction of the area, which has not been vested in the Regular Police. He has not even informed the Collector or his superior officers regarding the alleged information received by him about collection of Charas by a foreign national in the Revenue Police area.

Thus from the above discussion we find that the prosecution has utterly failed to prove its case against the accused appellant for the following reasons:

1. The Police Officer, on receiving information about the contraband article has not noted down the information in writing.
2. No public witness was examined by the prosecution although they were present at the spot.

3. No recovery of personal articles of the accused was made either from the alleged bag of charas or from the room.
4. There is no evidence to prove that the accused was in exclusive possession of the room either it was given to him on rent or he was the guest of Sri Govind Singh, owner of the house.
5. No search warrant was taken from the competent authority nor reason for the same was recorded in writing before conducting search and compliance of Section 42 (1) of the Act, has not been made.
6. Compliance of Section 42(2) of the N.D.P.S. Act has not been made by the Police as no information regarding search and seizure has been sent to the superior officer.
7. Instructions made by the Narcotics Control Bureau in its notification has not been complied with. The recovered article and samples were not sealed properly, two samples were not taken and the sample seal was not deposited in the Malkhana.
8. The link evidence that the seized article was not tempered with during the period it remained in the custody at Police Station and thereafter at Malkhana is completely missing.

9. The Police party conducted the raid in the Revenue Police area for which no prior permission was obtained from the competent authority and no satisfactory explanation has been given for the same.

For the above mentioned reasons we set aside the order dated 1.5.2002 passed by the Special Judge, Bageshwar in Special Sessions Trial No. 37 of 2001. The accused-appellant is acquitted. He is in jail. He be released forthwith if not wanted in any other case.

(Rajesh Tandon J.) **(Irshad Hussain J.)**

April 16, 2005

*Dhyani